

UNITED STATES

v.

ROCKY CONNER ET AL.

ROCKY CONNER ET AL.

IBLA 96-225, 97-343

Decided July 28, 1997

Appeal from a decision of Administrative Law Judge Harvey C. Sweitzer in mining claim contest N-55018 declaring placer mining claim N MC-46413 null and void and appeal from a decision of the Carson City District Office, Bureau of Land Management, finding the owners of placer mining claim N MC-46413 to be in trespass and ordering them to vacate the claim site. N-61198.

Affirmed; decision in mining claim contest N-55018 adopted.

1. Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally

A discovery exists only where the evidence establishes that mineralization is present in sufficient quantity and quality so as to render its profitable extraction reasonably likely. Where the land is withdrawn, discovery must be shown as of the date of withdrawal and at the time of the hearing to the hearing. Where the evidence fails to establish the existence of a sufficient quantity of adequate quality mineralization, a valuable mineral deposit within the meaning of the mining laws has not been shown.

2. Evidence: Burden of Proof--Mining Claims: Determination of Validity--Mining Claims: Discovery: Generally

When the Government contests a mining claim on the basis of lack of discovery of a valuable mineral deposit, it has the burden of going forward with sufficient evidence to establish a prima facie case as to that charge. A prima facie case has been made when a Government mineral examiner testifies that he has examined the exposed workings on a claim and has found the evidence of mineralization insufficient to support a finding of discovery of a valuable mineral

deposit. The mining claimant has the ultimate burden of refuting the Government's case by a preponderance of the evidence.

3. Mining Claims: Contests--Mining Claims: Determination of Validity

As against the United States, a mining claimant acquires no vested rights by location of a mining claim. Even though a claim may be perfected in all other respects, unless and until a claimant is able to show that the claim is supported by a discovery of a valuable locatable mineral deposit within the boundaries of the claim, no rights are acquired.

APPEARANCES: Rocky Conner, Carson City, Nevada, for Appellants; John R. Payne, Esq., Assistant Regional Solicitor, Office of the Regional Solicitor, U.S. Department of the Interior, Sacramento, California, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

On February 5, 1996, Administrative Law Judge Harvey C. Sweitzer issued a Decision in mining claim contest N-55018 declaring the Orestimba No. 1 placer mining claim (N MC-46413) to be null and void for lack of a discovery of a valuable mineral deposit. The claim, which encompasses about 40 acres, is situated in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ sec. 14, T. 15 N., R. 20 E., Mount Diablo Meridian, along the east bank of the Carson River adjacent to Deer Run Road on the outskirts of Carson City, Nevada. Appellants Raymond O. (Rocky) Conner, Jr., Raymond (Ray) O. Conner, Sr., and Frances S. Conner appealed and petitioned for a stay of Judge Sweitzer's Decision. 1/ That appeal was assigned IBLA Docket No. 96-225. On April 19, 1996, the Board issued an order denying the petition for stay.

On April 3, 1997, the Carson City District Office, Bureau of Land Management (BLM), issued a Decision finding the Conners in trespass and ordering them to cease their residential occupancy, remove their mining equipment and improvements from the claim site, and reclaim the lands by June 4, 1997. Therein, BLM cited the unauthorized use regulation, 43 C.F.R. § 2920.1-2, which specifies a trespasser's liability for costs incurred by BLM as a consequence of such trespass. The Conners appealed and filed a petition for stay. This appeal was assigned IBLA Docket No. 97-343. By Order dated June 12, 1997, the Board granted a stay of BLM's April 3, 1997, Decision, consolidated the two appeals, and granted expedited consideration.

1/ Contestees Iron Mountain Mining Trust and International Oceanic & Mining Trust did not appeal Judge Sweitzer's Decision.

On March 12, 1992, BLM issued contest complaint N-55018, charging that there was no discovery of a valuable mineral deposit within the limits of the Conners' Orestimba No. 1 placer mining claim and that the claim had not been occupied for reasons that were reasonably incident to or necessary for prospecting, mining, or processing operations under the mining laws. The Conners disputed the complaint and a hearing was held before Judge Sweitzer in Minden, Nevada, on February 23 and 24, 1993. Judge Sweitzer reconvened the hearing nearly 2-1/2 years later for 3 days, on August 7, 8, and 9, 1995.

In his February 5, 1996, Decision, Judge Sweitzer ruled that BLM had established a prima facie case of lack of discovery and that the Conners had failed to rebut that case by a preponderance of the evidence. He declared the claim null and void for that reason and found it unnecessary to rule on the other charge in the contest complaint.

In their statement of reasons (SOR) in IBLA 96-225, the Conners deny Departmental authority to contest mining claims and to withdraw and segregate the lands from mining entry, contending that their constitutional rights have been violated. The Conners urge that a valuable discovery was proved on their claim, that the evidence on which the Government's case is based is untrustworthy, and that the Judge's conclusions are in error.

In their SOR in IBLA 97-343, the Conners contend that BLM's attempt to eject them from the claim deprives them of due process rights and chills their opportunity to exhaust administrative remedies. The Conners repeat their charges concerning lack of Departmental jurisdiction and claim that they are unlawfully being deprived of their property.

The BLM responds that the Department's jurisdiction regarding mining contests and withdrawals is well settled, that there was no evidence to indicate that a valuable discovery existed on the claim, and that the claim has been properly declared invalid.

We have thoroughly reviewed the record in this case and the arguments advanced by the Conners and BLM. Judge Sweitzer's Decision set forth a complete summary of the testimony and other relevant evidence, as well as discussed the applicable law. We agree with Judge Sweitzer's findings and conclusions and adopt his Decision as our own. A copy of his Decision is attached. We add only the following.

The Orestimba No. 1 placer mining claim was originally located by Ray O. Conner, Sr., and Harold A. Chavez on November 22, 1967. Nearly 3 years later, on October 15, 1970, the Department segregated 5,900 acres of public land, including the land on which this claim was located, from appropriation under the general mining laws, with publication of notice in the Federal Register proposing to classify it for multiple-use management pursuant to Subchapter V of the Act of September 19, 1964, as amended, 43 U.S.C. §§ 1411-1418 (1964), 35 Fed. Reg. 16188 (Oct. 15, 1970). See

William H. Nordeen, 129 IBLA 369, 370-71 (1994). This segregation continued until December 18, 1970, when the Department further segregated the land from mineral entry with publication of notice in the Federal Register classifying it for multiple-use management pursuant to Subchapter V of the 1964 Act. 35 Fed. Reg. 19199 (Dec. 18, 1970). The segregation was still in effect at the time of the hearing. See Exs. G-4, G-5, at 18, and G-6, at 6.

[1] In order to have a valid claim excepted from the segregation, the Conners had to establish that they had discovered within the limits of their claim a valuable mineral deposit as of October 15, 1970, and at the time of the hearing. See Cameron v. United States, 252 U.S. 450, 456 (1920); Lara v. Secretary of Interior, 820 F.2d 1535, 1542 (9th Cir. 1987); United States v. Mavros, 122 IBLA 297, 301-02 (1992). A "valuable mineral deposit" is one of such quality and in such quantity as to warrant a person of ordinary prudence in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. Chrisman v. Miller, 197 U.S. 313, 322 (1905). Thus, there must be a reasonable likelihood that the commercial value of the deposit exceeds the costs of extracting, transporting, processing, and marketing it. United States v. Coleman, 390 U.S. 599, 600, 602-03 (1968); In Re Pacific Coast Molybdenum Co., 75 IBLA 16, 29 (1983). For this case, a crucial requirement is that the deposit be physically exposed as of the date of segregation from mineral entry. No further exploration to obtain such an exposure may be permitted after that date. United States v. Mavros, *supra*, at 302.

[2] When the Government contests a mining claim because it is not supported by the discovery of a valuable mineral deposit, it must go forward with evidence to make a prima facie case that no discovery exists, whereupon the claimant has the ultimate burden of persuasion to establish by a preponderance of the evidence that a discovery exists as to those matters placed in issue by the Government. United States v. Springer, 491 F.2d 239, 242 (9th Cir. 1974), cert. denied, 419 U.S. 834 (1974); United States v. Hooker, 48 IBLA 22, 26-27 (1980); United States v. Taylor, 19 IBLA 9, 22-23 (1975).

Judge Sweitzer properly found that BLM established a prima facie case of lack of discovery of a valuable mineral deposit. He then stated that while Ray Conner did identify several locations from which material was mined in 1968, 1969, and 1970, "the material was commingled in a single collection pile, making it impossible to draw conclusions as to the quality of the minerals in any location." (Decision at 6.) He found that "it is not possible to discern the extent or location of any mineral deposit which purportedly was discovered before withdrawal of the claim in 1970." (Decision at 6.) He further found that there was insufficient evidence of a pre-withdrawal discovery and that "[b]ased upon this finding alone, the claim must be declared invalid." (Decision at 7.)

[3] Although the Connors charge that this Department lacks authority to contest their claim, it is well settled that the Department is vested with such authority.

The determination of the validity of claims against the public lands was entrusted to the General Land-Office in 1812 (2 Stat. 716) and transferred to the Department of the Interior on its creation in 1849. 9 Stat. 395. Since that time, the Department has been granted plenary authority over the administration of public lands, including mineral lands; and it has been given broad authority to issue regulations concerning them.

Best v. Humboldt Placer Mining Co., 371 U.S. 334, 336 (1963) (footnotes omitted).

Of course, the land department has no power to strike down any claim arbitrarily, but so long as the legal title remains in the Government it does have power, after proper notice and upon adequate hearing, to determine whether the claim is valid and, if it be found invalid, to declare it null and void.

Cameron v. United States, *supra*, at 460.

This Board has held that, as against the United States, a mining claimant acquires no vested rights by location of a mining claim. Even though a claim may be perfected in all other respects, unless and until a claimant is able to show that the claim is supported by a discovery of valuable locatable mineral within the boundaries of the claim, no rights are acquired. United States v. Knoblock, 131 IBLA 48, 78 (1994); United States v. Mineco, 127 IBLA 181, 191 (1993). In addition, the continuing authority of the Department to inquire into the validity of claims so long as legal title remains in the Department has been repeatedly reaffirmed by the courts. See, e.g., Schade v. Andrus, 638 F.2d 122, 124-25 (9th Cir. 1981); Ideal Basic Industries, Inc. v. Morton, 542 F.2d 1364, 1367 (9th Cir. 1976).

Similarly, the authority to withdraw public lands for a specific purpose, thereby segregating them from entry under the mining law or other laws is also well established. The authority to withdraw, modify, extend, or revoke a withdrawal is specifically delegated to the Secretary and his officers by Congressional enactments. Resource Associates of Alaska, 114 IBLA 216, 219 (1990).

In this case, the Connors received the full measure of due process. They were notified of the contest and participated at a fact finding hearing, after which the Administrative Law Judge issued a decision finding the claim invalid. That decision, after review by this Board, has been found to be correct. The Connors have brought up nothing on appeal to

controvert the findings of fact and conclusions of law reached by Judge Sweitzer. The Conners' mining claim was properly declared invalid and an invalid claim gives the claimant no rights. Consequently, a claimant's private appropriation of land embracing an invalid claim is in derogation of the rights of the public, Cameron v. United States, *supra*, at 460, and BLM's Decision directing the Conners to vacate the claim and remove their improvements is also correct.

To the extent not addressed herein, the Conners' other arguments have been considered and rejected.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decisions appealed from are affirmed. Judge Sweitzer's Decision in mining claim contest N-55018 is adopted.

Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

Will A. Irwin
Administrative Judge

UNITED STATES OF AMERICA,	:	N-55018
	:	
Contestant	:	Involving Orestimba #1 Placer
	:	Mining Claim situated in the
v.	:	SW $\frac{1}{4}$ SE $\frac{1}{4}$, Section 14, T. 15 N.,
	:	R. 20 E., Mount Diablo Meridian,
ROCKY CONNER, RAY O. CONNER,	:	Ormsby County, Nevada
FRANCES S. CONNER, IRON	:	
MOUNTAIN MINING TRUST, AND	:	
INTERNATIONAL OCEANIC &	:	
MINING TRUST	:	
	:	
Contestees	:	
	:	

DECISION

Appearances: John R. Payne, Esq., Sacramento, California, for contestant;

Rocky Conner, pro se, for contestees Rocky Conner, Ray O. Conner, and Frances S. Conner;

Bert M. Cabot trustee, for contestees Iron Mountain Mining Trust and International Oceanic & Mining Trust.

Statement of the Case

The Bureau of Land Management (BLM), United States Department of the Interior, filed a complaint charging (1) that minerals have not been found within the limits of the Orestimba #1 placer mining claim in sufficient quantities and/or qualities to constitute a discovery of a

valuable mineral deposit and (2) that the claim has not been occupied for reasons that are reasonably incident to or necessary for prospecting, mining, or processing operations under the mining laws. The Complaint prays that the claim be declared null and void.

Hearings in the matter were held in Minden, Nevada, on February 23 and 24, 1993, and in Reno, Nevada on August 7, 8, and 9, 1995. At the hearings, contestees moved to dismiss the matter for lack of jurisdiction and that motion was denied (Tr. 458-461). The record also contains the depositions of James J. Hodos and Ellen J. Hodos taken July 7, 1995.

The parties filed post-hearing briefs in support of their respective positions. Having reviewed and considered all evidence and briefs, and for the reasons set forth below, I must conclude that the Orestimba #1 placer mining claim is void for failure to discover a valuable mineral deposit and, consequently, I need not decide the issue of whether the claim has been occupied for reasons that are reasonably incident to or necessary for prospecting, mining, or processing operations under the mining laws.

Statement of Facts

The Orestimba #1 placer mining claim was located by contestee Raymond (Ray) O. Conner and Mr. Harold A. Chavez on November 22, 1967. The contestees assert that the claim contains valuable deposits of gold, silver, titanium, and monazite (Ex. G-6, p. 16).

Although the BLM file for the claim shows no change of ownership documents (Ex. G-6, p. 6), the hearing record shows that in the late 1970's, Mr. Chavez transferred his interest in the claim to Mr. Conner (Tr. 11, 30-31). The record also indicates that Mr. Conner's wife, Frances S. Conner, and his son Rocky, acquired an interest in the claim (Ex. G-6, p. 6). While the contestees are in dispute as to whether Iron Mountain Mining Trust and International Oceanic & Mining Trust are proper parties (Tr. 22-23, 731-732), based upon a general warranty deed dated April 27 and recorded April 28, 1993, in the Ormsby County Records, whereby the Conners ostensibly convey a one-third interest in the claim to the two trusts, they were made parties to the action (Tr. 32-33, 734-736). Contestee Rocky Conner has resided on the claim since 1988 and has operated a mill on the claim (Tr. 684-685, 736-743; Ex. G-6, p. 4).

Ray Conner's significant activities on the claim date back to 1960, when he began construction of a mill which he completed in 1963 (Tr. 568-571). During construction of the mill, he sampled and processed material from the claim through his mill equipment to ensure that it was operational (Tr. 653). For each of those years, he estimated producing an undetermined, minor amount of ore valued between \$1,000 and \$2,000, but the costs of extracting and processing this ore were not disclosed (Tr. 654-655). The amount or value of any production in the ensuing years between 1963 and 1968 was not specified (Tr. 655).

For the years 1968, 1969, and 1970, he estimated his annual excavation of material to be 500 tons, 40 to 60 percent of which came from various locations on the Orestimba # 1 claim that were placed in a single collecting pile (Tr. 637-638, 656-665). His operation was seasonal due to snow and floods (Tr. 592). For the year 1970, he earned gross proceeds of \$2,925.00 and net proceeds of \$848.17 from mining material on the Orestimba #1 claim and other claims (Exs. V, W). There is no evidence of the amount or value of the ore recovered in 1968 or 1969 (see, e.g., Tr. 656). Nor is there any detailed evidence of the sample/excavation methods, the amount of material taken from specific locations, or the amount of ore retrieved from specific locations..

On December 16, 1970, the land upon which the claim is located was segregated and withdrawn from mineral entry (Ex. G- 15). The withdrawal was later revoked with respect to some of the lands affected by the December 16, 1970, segregation (Tr. 511). However, that revocation did not affect the land upon which the claim is located, which remains withdrawn from mineral entry (Tr. 512).

Annual production during the years between 1970 and 1976 was approximately 10 percent of the production of 1970 (Tr. 666). The dramatic drop in production was attributable to two factors: (1) Ray Conner devoted his attention to his full-time job which met his need for a consistent income, and (2) his lack of sufficient capital (Tr. 666-667).

For the years 1976 through 1979, Mr. Conner's testimony of earning net annual proceeds of \$2,000 (Tr. 628-629) was contradicted by documentation which he filed with BLM. That documentation shows that no material was mined in 1976 and that he incurred a loss from mining operations for each of the years 1977, 1978, and 1979 (Exs. G-17, G-18, G- 19, G-20; Tr. 779-780).

After Ray Conner became ill in the early 1980's, Rocky Conner took over the mining and milling activities on the claim (Tr. 617, 684). In 1982, he "rejuvenated the mill" and, from that time until September of 1992, he mostly milled lode material from other claims, as the milling equipment was configured to process primarily hard rock (Tr. 89-90, 704, 767-768). This use of the claim was made pursuant to a Notice filed in 1982, proposing continuous use of the milling facility (Tr. 493). After the Notice was filed, Ron Buder, a BLM geologist, conducted compliance inspections each year to insure that the use of the land conformed to the proposal in the Notice (Tr. 492-494).

During a January 28, 1988, compliance inspection, Mr. Buder discovered that Rocky Conner was residing on the claim in a double-wide mobile home (Tr. 496). Mr. Buder visited the claim on several occasions thereafter (Tr. 498-502). He never observed any placer mining or placer processing operations on the claim (Tr. 503-504). Daniel Jacquet, a BLM geologist and certified mineral examiner who was also familiar with the claim site, similarly had never seen placer processing, milling, or mining operations on the claim (Tr. 58; Exs. G-1).

A surface use/validity examination of the claim was conducted by Messrs. Jacquet and Buder in the spring of 1991 (Ex. G-6, pp. 4, 15-16; Tr. 35, 37). Their observations are detailed in a Mineral Report (Ex. G-6).

Ray and Rocky Conner were present at the surface use/validity examination and stated that gold, silver, titanium, and monazite were present as very fine-grained detrital particles in the black sand portion of the fluvial sands and gravels on the claim (Ex. G-6, p. 16). Ray Conner allowed his son, Rocky, to designate the areas to be sampled and did not mention the areas which he mined during the 1960's and 1970's (Tr. 680). Initially, on February 20, 1991, Rocky identified three locations on the claim which best represented the placer deposit (Ex. G-6, p. 16). The Conners intended to excavate these sites in preparation for the BLM sampling of the claim contemplated to occur at the end of April 1991 (Id.).

On April 30, 1991, the BLM sampling occurred (Id.). BLM enlisted the assistance of Ellen and Jim Hodos of On-Stream Resource Managers, Inc., to sample and to perform analytical work (Id.). Rocky Conner requested that BLM sample two of the three sample sites previously identified (Id.). These sites were identified as sample sites OR1-1 and OR1-2, and four samples were taken from each site (Id.). Other sites proved unsuitable for sampling due to the thickness of the overburden (Id.). The unsuitable sites had been excavated by the Conners to a depth of approximately 15 feet, but they did not encounter the metal bearing sands and gravels (Id.). As Rocky Conner conceded, he was unable, at that time, to obtain the necessary equipment to dig deeper to the depths that he wanted sampled (Tr. 705).

Eventually, he did dig a shaft to those depths and produced 4 ounces of gold from 50 tons of material taken from the shaft (Tr. 742-743; Ex. GG). He also removed 250 tons of material from one sample location near where BLM had sampled but lying underneath the level of material exposed for BLM. From this material he produced 10.5 ounces of gold (Tr. 738-739, 742; Exs. II, FF). Prior to his excavation of these materials in 1993 and 1994, he was not aware of the existence of the richer ore located at those sample locations (Tr. 765) and neither area had been exposed and accessible for BLM to sample at the time of the surface/validity examination (Tr. 736-744).

He asserted that these excavations in 1993 and 1994 constituted placing the placer claims "into production." (Tr. 706, 729) He indicated that he did some sampling on the Orestimba #1 claim and other placer claims during the 1980's, but would not characterize this activity as "full production." (Tr. 768)

After the BLM samples were processed, the assay results indicated that gold and silver are present on the claim in trace quantities "close to crustal abundance" and that titanium and monazite are present in low concentrations and are of a type which cannot be economically concentrated (Ex. G-6, p. 22). For instance, the estimated value of the gold present ranged from \$0.00 per cubic yard of mined material to \$0.0089 per cubic yard of mined material (Id.). These values are far lower than the contestees' own estimated operating costs of \$2.00

per cubic yard of mined material and the average capital and operating costs of a small to moderate size placer mine of \$3.25 per cubic yard of mined material (Id.).

Based upon his examination of the claim, which included consideration of the local geology and mining history that does not favor a finding of a discovery (Tr. 236; Ex. G-6, pp. 9, 11), Mr. Jacquet determined that none of the minerals identified by the Conners existed in sufficient quantity or quality to constitute a discovery of a valuable mineral deposit, either at the time of the hearing or at the time of withdrawal (Tr. 51, 57, 94-95; Ex. G-6, p. 3). The Hodos agreed that the claim did not contain commercial quantities of gold, silver, titanium, or monazite, either individually or in combination (Tr. 111, 207, 209-212). Mr. Jacquet also noted in the Mineral Report that only a limited amount of placer material, which he estimated at less than 1,000 cubic yards, has been mined by the Conners on the claim (Ex. G-6, p. 14). In Mr. Jacquet's opinion, a prudent man would not spend his labor and means in the hope of developing a paying mine on the claim (Tr. 57-58).

Discussion

I.

Was a prima facie case established?

When the Government contests the validity of a mining claim, it bears only the burden of going forward with sufficient evidence to establish a prima facie case. Once a prima facie case is presented, the claimant must present evidence which preponderates sufficiently to overcome the Government's case on those issues raised. United States v. Eva M. Pool et al., 78 IBLA 215, 220 (1984).

In this case, a prima facie case was established that the subject claim is invalid for failure to discover a valuable mineral deposit. The discovery of a valuable mineral deposit is a prerequisite to a mining claim being found valid. 30 U.S.C. § 22 et seq.; United States v. Burt, 43 IBLA 363, 366 (1979). With respect to land which has been withdrawn from mineral entry, a discovery of a valuable mineral deposit must exist at the date of withdrawal and at the date of hearing. United States v. Weber Oil Co., 89 I.D. 538 (1982).

The standard utilized to determine whether a discovery of a valuable mineral deposit has been made is the "prudent man" test. United States v. Coleman, 390 U.S. 599 (1968). Accordingly, there must be found within the limits of the contested mining claim mineral of such quality and quantity as to justify a person of ordinary prudence in the further expenditure of his labor and means with a reasonable prospect of success in developing a paying mine. Converse v. Udall, 399 F.2d 616 (9th Cir. 1968), cert. denied, 393 U.S. 1025 (1969); United States v. Edeline, 39 IBLA 236, 238 (1979).

This "prudent man" test has been refined to require a showing that the claimed mineral is capable of extraction, removal and marketing at a profit, the so-called "marketability test." United States v. Hooker et al., 48 IBLA 22, 23-29 (1980). Application of the marketability test presupposes the established existence of a mineral deposit and is utilized as an aid in determining whether it is a valuable mineral deposit such that a reasonable prospect exists for its successful exploitation. United States v. Willie White et al., 118 IBLA 266, 312 (1991).

A prima facie case was established both by the evidence in the Mineral Report that only a limited amount of production—less than 1,000 cubic yards—had occurred since location of the claim in 1967, see United States v. Rosenburger, 71 IBLA 195, 200 (1983), and by the conclusion of BLM's certified mineral examiner, Mr. Jacquet, that no discovery of a valuable mineral deposit has been made, see United States v. Bruce Gillette et al., 104 IBLA 269, 274-275 (1988). Contestees have the burden of overcoming this prima facie case by showing that a discovery of a valuable mineral deposit has been made.

II.

Did contestees overcome contestant's prima facie case by showing that a discovery of a valuable mineral deposit has been made?

Contestees failed to overcome the prima facie case, as they failed to show that a discovery of a valuable mineral deposit had been made at the date of withdrawal and continued to exist at the date of hearing. This failure is attributable to the many flaws in contestees' evidence.

First, it is not possible to discern the extent or location of any mineral deposit which purportedly was discovered before withdrawal of the claim in 1970. Raymond Conner did not identify the location(s) from which material was taken to run through the mill equipment in the early 1960's. For the material mined in 1968, 1969, and 1970, he did identify several locations from which it came, but the material was commingled in a single collecting pile, making it impossible to draw conclusions as to the quality of the minerals in any location. Moreover, contestees did not attempt to analyze this evidence to show the location and extent or parameters of the purported mineralization (mineral deposit). There must be evidence of the extent of the mineralization. United States v. Willie White, 118 IBLA 266, 308-314 (1991). Without this evidence, it is not possible to conclude that a mineral deposit existed at the date of withdrawal, let alone a mineral deposit which was valuable. See id.

Second, contestees failed to identify the size or nature of each of the pre-withdrawal samplings from which the "production" originated. Nor did they detail how the samplings were taken. Without such evidence, the samplings cannot be determined to be representative and are thus entitled to little weight. See United States v. Ray Guthrie et al., 5 IBLA 303, 308 (1972); United States v. Vernon W. Clifton, 14 IBLA 146, 151 (1974); United States v. Bradley F. Denham, 29 IBLA 185, 190 (1977). These samplings are entitled to little weight

for the additional reason that contestees failed to show their chain of custody, creating further doubt as to whether these samplings are uncontaminated.

Contestees conducted some sampling after the withdrawal as well. These samplings may be used to confirm the existence of a discovery prior to withdrawal if contestees can show that there was an exposure of the mineral deposit at the date of withdrawal and that the postwithdrawal samplings came from the same mineral deposit. See United States v. Harlan H. Foresyth et al., 100 IBLA 185, 207 (1987).

As previously discussed, contestees did not show that they had physically exposed a mineral deposit prior to withdrawal, as they failed to provide sufficient details or analysis of their prewithdrawal samplings to establish the existence of a mineral deposit. Therefore, they may not use the post-withdrawal samplings (also characterized as "production") to establish the existence of a pre-withdrawal discovery.

In sum, there is insufficient evidence of a pre-withdrawal discovery. Based upon this finding alone, the claim must be declared invalid.

The claim must be held invalid for the additional reason that there is insufficient evidence of the existence of a discovery at the time of the hearing. The evidence of the post-withdrawal samplings is flawed in much the same way as that of the pre-withdrawal samplings.

First, contestees failed to identify the size or nature of most of the post-withdrawal samplings or the details of how they were taken. These samplings are entitled to little weight for the" additional reason that contestees failed to show their chain of custody, creating further doubt as to whether these samplings were uncontaminated.

Contestees did detail the size of the samplings taken in 1993 and 1994, but these samplings cannot be tied to any pre-withdrawal exposure of mineralization, as Rocky Conner conceded that these samplings were taken from unexposed areas of greater depth below the surface and that they contained higher quality mineralization of which he had not been previously aware.

Second, the 1993 and 1994 samplings and other post-withdrawal samplings fail to show the existence of a discovery at any time for the additional reason that it is not possible to discern the extent or location of any mineral deposit which purportedly was discovered. There is no evidence of the location or value of any mining which occurred between 1970 and 1977 or between 1979 and the date of the first hearing. There was evidence of the value of material mined for 1977, 1978, 1979, 1993, and 1994, but contestees did not attempt to analyze this evidence to show the location and extent of the purported mineralization (mineral deposit).

Finally, contestees presented no evidence of the estimated costs of mining the claim. While the Mineral Report indicates that contestees estimated their total operating costs at \$2.00 per cubic yard of mined material, this cost estimate is unsupported by specific cost data, and is

therefore inherently unreliable and of little probative weight. United States v. Gillette, 104 IBLA 269, 275 (1987). Without reliable cost data, contestees cannot show that the claimed minerals are capable of extraction, removal and marketing at a profit.

Contestees also assert that two reports evidence the existence of a discovery. One of these reports pertained to mineralization of "high potential" on another claim, not the Orestimba #1 claim (Ex. G-6, p. 12, 14). The report fails to identify the location or methodology of sampling or methodology of assaying. More importantly, contestees failed to explain how, or establish that, mineralization on another claim indicates the existence of a mineral deposit or discovery on the Orestimba #1 claim.

Another mineral report regarding a "sample of black sand concentrates for the Carson River" was completed by the Bureau of Mines, U.S. Department of the Interior, in 1976 (Ex. EE). That report does not indicate whether the sample was taken from the Orestimba #1 claim. Rocky Conner believed that the sample came from the claim (Tr. 721). Because the sample contained native mercury beads, Messrs. Jacquet and Budor thought it was likely that the sample came from a place downriver of the Comstock Lode (Ex. G-6, p. 15). The Orestimba #1 claim is upriver from the Comstock Lode (Ex. G-6, p. 16). In any event, the specific location of the sample was not identified. Furthermore, because the sample was black sands concentrate (Tr. 770-772), the amount of original material from which it came is unknown. In light of these facts, the Bureau of Mines report can be given little or no weight in determining whether a discovery exists on the claim.

The contestees also offered much criticism of the sampling and assaying methods used by Messrs. Jacquet and Budor and the Hodos (see Tr. 709-729). The short answer to this criticism is that contestees cannot refute the existence of the prima facie case by submitting such evidence in their case-in-chief. See United States v. Rich Knoblock, 131 IBLA 48, 82-84 (1994). Rather than criticize the government's testing methods, contestees must produce evidence to overcome the government's case. Lara v. Secretary of the Interior, 820 F.2d 1535, 1542 (9th Cir. 1987). They failed to produce such evidence.

Furthermore, their criticisms do not withstand scrutiny. A few examples will suffice to show this. First, Rocky Conner complained that the BLM samples were not taken from the areas which he designated. He stated that sampling OR1-2 was taken to the left of the area he wanted sampled. However, he also conceded that he was told that the area which he wanted sampled was unsafe because of the possibility of caving (Tr. 711 -712). It is the contestees' responsibility to make any discovery available to be sampled. United States v. Smith, 54 IBLA 12, 14 (1981). An area which is not safe for sampling is not available for sampling. Rocky Conner asserted that OR1-1 also was not taken where he wished. He wanted the sample taken from an area covered by water (Tr. 713). Again, it was the contestees responsibility to make the area available, i.e., free from water, for sampling. Moreover, both Mr. Jacquet and Mrs. Hodos testified that Rocky Conner identified and agreed to the sites sampled (Tr. 67, 204).

Second, contestees disputed the use of canvas in the sluice used in processing the BLM samples. Mr. Hodos had used canvas on many previous occasions for other clients and explained why it was advantageous to do so (Tr. 123-125). His established expertise surpasses that established for the contestees (see Ex. G-8), and both he and a BLM placer examination handbook recommend use of the canvas for sampling (Tr. 123-125; Ex. I-D).

In general, the expertise shown for the contestees is surpassed by that of Messrs. Jacquet and Buder and the Hodos. One or more of them refuted each of the contestees criticisms with an explanation of why a certain method of sampling or processing was chosen and with a statement that the method was a standard technique or practice.

Finally, the contestees complain that they did not receive adequate notice of the proposed withdrawal and subsequent withdrawal of the land in 1970. This is not the proper forum to raise this complaint. Consequently, it has no bearing upon the determination in this decision of whether the claim is valid.

Conclusion

Based upon the foregoing, the subject mining claim must be, and is hereby, declared null and void for failure to discover a valuable mineral deposit.

Harvey C. Sweitzer
Administrative Law Judge